

August 2015

The Present Antitrust Jungle

G. William Trivoli

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>



Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

Trivoli, G. William (1972) "The Present Antitrust Jungle," *Akron Law Review*: Vol. 5 : Iss. 1 , Article 3.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol5/iss1/3>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

THE PRESENT ANTITRUST JUNGLE

G. WILLIAM TRIVOLI*

UNTIL RECENT YEARS, the prevailing attitude toward antitrust could be characterized as quite favorable but that it lacked either necessary moral or financial support. However, this opinion has almost completely changed. Lawyers and economists specializing in antitrust, who were once enthusiastic supporters, now have become critical of both the law and its enforcement.¹

John Kenneth Galbraith's characterization of antitrust as a "charade" is being heeded by more observers.² What appears to be the reason for this shift in feeling regarding antitrust? How did antitrust policy get into its present state? And, most importantly, how may antitrust be rescued from this dilemma?

This article is a modest attempt to examine the above questions. First, a brief review of the historical framework of antitrust is presented to gain some perspective of the present problems. Second, there is a brief review of the legal and economic concepts of monopoly. Next, there is a brief discussion of two important unresolved issues of antitrust, conglomerate mergers and economic concentration. Finally, several recommendations are made for changes and improvements in antitrust to make it more effective and less cumbersome.

THE HISTORICAL FRAMEWORK OF ANTITRUST POLICY

Americans traditionally have been suspicious of restraint of trade and monopoly power. It is no surprise that during a period generally characterized as pro-business, the United States Congress passed the primer antitrust statute, the Sherman Antitrust Act.³ The law merely made what had been previously an offense under common law, a federal offense.

* Associate Professor of Finance, University of Akron, Department of Finance, College of Business Administration. B.S., Grove City College; M.B.A., Duquesne University; Ph.D., University of Virginia.

¹ Dewey, *The Shaky Case for Antitrust*, CHALLENGE, Jan.-Feb. 1966, at 17.

² J. K. Galbraith, "Are Planning and Regulation Replacing Competition in the New Industrial State?" *Hearing, of the Senate Select Committee on Small Business, on Planning, Regulation, and Competition Before Subcommittee*, 90th Cong. 1st Sess. (1967).

³ Sherman Anti-trust Act §§1, 2, 15 U.S.C. §§1, 2 (1890), as amended 15 U.S.C. §§1, 2 (1955).

Framers of the Sherman Act and the majority of Congress voting for its passage were not behaving inconsistently. One can be basically in favor of industry yet opposed to restraints of trade and the ills of monopoly.

The major departure of the Sherman Act from common law was to convert treatment of contracts in restraint of trade as null and void by the courts into a federal offense and provide for specific penalties or remedies. The statute's fundamental purpose was both clear to the originators and has been to most observers—that purpose being to “(1) prevent the exercise and growth of monopoly, and (2) retain as far as possible, and restore, the business practices of free entry and price competition.”⁴

Despite general agreement on the basic purpose of the Sherman Act, there has been great uncertainty and disagreement with respect to the Act's interpretation and enforcement. Confusion over the interpretation and the policies which should guide the law's application has led a number of scholars to determine that the original legislative intent and policy of the Sherman Act has not been followed. One such study is by Robert H. Bork of the Yale Law School. Following an exhaustive study of the Congressional Record, Professor Bork concluded: “. . . Congress intended the courts to implement . . . that value we would today call consumer welfare. . . .”⁵ It is Bork's feeling that since the legislative history of the Sherman Act showed consumer welfare to be the decisive value in weighing injury, it should therefore be treated by the courts as the only value.⁶ The basic problem with the vaguely phrased Sherman Act, Bork believes, is that the federal courts have never arrived at a definitive statement of values or policies which should control the law's application and evolution.

Professor Bork maintains that the Rule of Reason, originally enunciated by Chief Justice White in the 1911 *Standard Oil*⁷ and *American Tobacco*⁸ opinions, was the most faithful reflection of Senator Sherman's and his colleagues' policy intentions. Bork points out that:

There was in White's opinions, as in Sherman's speeches, the idea that the statute was concerned exclusively with consumer welfare and that this meant the law must discourage restriction of output without hampering efficiency.⁹

The Rule of Reason, which regards only unreasonable restraints of trade as unlawful, is considered by Bork as completely in keeping with

⁴ V. A. MUND, *GOVERNMENT AND BUSINESS* 101 (4th ed. 1965).

⁵ Bork, *Legislative Intent and the Policy of the Sherman Act*, 6 J. LAW & ECON. 7 (1966).

⁶ *Id.* at 11.

⁷ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁸ *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

⁹ Bork, *supra* note 5, at 47.

the concept of consumer welfare. Moreover, Mr. Justice White provides a useful and workable policy guide to control the law's future application as well as its evolution. The court, in applying the Rule of Reason, was to first consider the impact of the merger on market structure, and second examine the particular situation in light of the factual showing of illegality.¹⁰

By application of the Sherman Test, Mr. Justice White not only incorporated into the Rule of Reason the major rules of law which Sherman envisaged as implied by a consumer-welfare policy, but also allowed for the future implementation of increased knowledge of business concentration and improved economic analysis. Mr. Justice White provided a fixed policy guide—consumer-welfare. Additionally, he incorporated the principle of change in the Rule of Reason to allow for improved techniques and changing conditions.¹¹

THE EMERGENCE OF THE SPLIT-PERSONALITY OF ANTITRUST

A dichotomy in antitrust policy has developed due mainly to a failure of the courts to steadfastly adhere to original legislative intent of the Sherman Act and to the proliferation of confused and confusing antitrust policies. Beginning with the Clayton Act,¹² especially Section 2, the Robinson-Patman Act,¹³ and the Federal Trade Commission Act,¹⁴ the original emphasis of the Sherman Act, *i.e.*, prevention of monopolization and restraint of trade in order to maintain open competition for the benefit of the ultimate consumer, has been supplanted.

Through a series of court decisions, there appeared a discernible shift in the emphasis of antitrust policy toward the protection of rights and privileges of competitors, for the alleged purpose of strengthening competition. Although the Clayton and Federal Trade Commission Acts were intended to be supplemental to the Sherman Act, these new Acts directed attention mainly at injury to competitors. This changed emphasis tended to shift antitrust enforcement after 1914. In *United States Steel*,¹⁵ for instance, the defendant's argument that no evidence pointed to any action that could be construed as detrimental to United States Steel's competitors was accepted by the Supreme Court majority.¹⁶ Mr. Justice McKenna in his opinion states: "... there was no evidence that it (U.S. Steel) attempted to crush its competitors or drive them

¹⁰ 221 U.S. at 63-66 (1911).

¹¹ Bork, *supra* note 5, at 47.

¹² 15 U.S.C. §13 (1914), *as amended*, 15 U.S.C. §13c (1936).

¹³ 15 U.S.C. §§13, 13a, 13b, 21a (1936), *as amended*, 15 U.S.C. §13c (1938).

¹⁴ 15 U.S.C. §45a, *as amended*, 15 U.S.C. §45a (1960).

¹⁵ *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

¹⁶ *Id.* at 447-49.

from the market."¹⁷ The Court, in this decision, relied almost entirely upon the value of protection of competitors and virtually ignored the value of consumer welfare.¹⁸

The attempt to protect consumer welfare on the one hand, and competitors on the other, has led antitrust enforcers and the courts into a never-ending struggle of interpretation. One analyst has said:

The common law rules dealing with restraint of trade and unfair competitive practices were concerned less with protecting the consumer than with protecting businessmen from one another. The antitrust laws sought both ends, finding no incompatibility between them.¹⁹

Suppose a large discounter charges a discriminatory price in a particular market area; all existing retailers selling competitive merchandise suffer varying degrees of sales reduction if they fail to meet the lower price. Under the Robinson-Patman Act, the existing retailers might bring an antitrust suit against the discounter alleging price discrimination.²⁰ Yet, under the Sherman Test, the ultimate consumer has been benefited by the greater variety and lower prices as long as (1) the competitive structure has not been substantially altered by the entrance of the discounter, or (2) no predatory or illegal methods were used by the discounter to gain customers.²¹

The incompatible dichotomy of antitrust policy—consumer-welfare and protection of competitors—has led enforcement agencies and the courts to confuse these two ends, thus weakening the force of effective competition. The fact that Congress has created an entirely new Consumer Protection Agency²² supports the contention that antitrust enforcers cannot be guided by two basically contradictory goals. Representative Erlenborn (R.-Ill.) testified in a hearing on the new consumer agency that the Federal Trade Commission did in fact have the power and was originally created by Congress to carry out many functions to be conferred upon the CPA. But, Representative Erlenborn said, "[I]f the FTC has been doing the job Congress wanted it to do, we wouldn't be under pressure to do this (establish a consumer protection agency) today."²³

¹⁷ *Id.* at 441.

¹⁸ See also *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Associated Press v. United States*, 326 U.S. 1, 25-29 (1945); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2nd Cir. 1945), for other examples of court opinions emphasizing values other than consumer welfare.

¹⁹ A. KAHN, *Standards for Antitrust Policy*, MONOPOLY POWER AND ECONOMIC PERFORMANCE 172 (E. Mansfield ed. 1968).

²⁰ Robinson-Patman Act, *supra* note 13.

²¹ *Standard Oil Co.*, 221 U.S. at 75-6.

²² H.R. 10835, passed House of Rep. Oct. 14, 1971, Senate Bill 1177 presently in Senate Gov't Operations Committee, 92 Cong. 1st Sess. (1971).

²³ Washington Report, American Advertising Federation, No. 8, Oct. 15, at 3 (1970).

Moreover, in the Nixon Administration's recommendation for major overhaul of federal regulatory and antitrust units, there is provision for the creation of a Federal Antitrust Board and a Federal Trade Practices Agency to take over, respectively, the antitrust and consumer protection activities; the Federal Practices Agency would take over the remaining functions of the FTC and administer new consumer protection legislation. Much of new consumer protection legislation would perhaps be unnecessary had antitrust policy always followed the guiding principle of consumer welfare.

It is impossible to determine beforehand whether an allegedly unfair elimination of a competitor weakens the vitality of the competitive structure of an industry. A former respected Assistant Attorney General of the Antitrust Division, Donald F. Turner, has stated unequivocally that:

The fundamental purpose of the antitrust laws is to encourage competitive striving. It would be a little paradoxical, to say the least, to turn on the winner when he wins. If that were regular practice, one might anticipate some disincentive problems which may reach serious proportions.²⁴

At a minimum, this "split-personality" of antitrust policy has resulted in extreme confusion among both businessmen and enforcers. And, probably, the desire to protect competitors has resulted in failure to protect the ultimate consumer's welfare.

Returning to Senator Sherman's views on the policy to be served by antitrust law, in his own words appearing on the bill he drafted and reported from the Committee on Finance, he states section 1 of the bill declares illegal two classes of "arrangements, contracts, agreements, trusts, or combinations"; (1) those "made with a view, or which tend, to prevent full and free competition," and (2) those "designed, or which tend, to advance the cost to consumer" of articles of commerce.²⁵ The Sherman approach clearly indicates the author's desire for courts to be controlled by the interest of the consumer. Furthermore, the twofold purpose of the act—to maintain free competition, and prevent monopolistically high prices—stresses the major economic effects of monopoly.

BRIEF REVIEW OF THE LEGAL AND ECONOMIC CONCEPTS OF MONOPOLY

The Sherman Act does not find large firm size illegal in itself, but illegality is found when there is an overwhelming percentage control of an industry, or when there exists predatory acts or unworthy motives

²⁴ D. Turner, *Hearing on Planning, Regulation, and Competition Before the Subcommittee of the Senate Select Committee on Small Business*, 90th Cong., 1st Sess. 28 (1967).

²⁵ 21 Cong. Rec. 1765 (1890) (remarks of Senator J. Sherman).

by the firm.²⁶ These are often referred to as the Rule of Reason or Sherman Tests for misuse of large size or monopoly power discussed above. There are also a number of per se violations of the Sherman Act that are considered illegal when discovered. These were announced by Mr. Justice Peckham in the *Trans-Missouri*²⁷ case and include any concerted action to fix prices, divide sales areas, allocate customers, deny supplies, or limit production.²⁸ These per se violations are in agreement with original legislative intent of the Sherman Act since all the above activities could be interpreted as interfering with consumer welfare.

It is with the Learned Hand decision in *United States v. Aluminum Co. of Am.*²⁹ that a dramatic shift occurred in the application of the Sherman Act to the monopoly situation. Judge Hand found Alcoa possessed a monopoly in the arbitrarily defined virgin aluminum ingot market,³⁰ although he recognized that the lower court observing the identical evidence, employed a different market definition under which it found Alcoa held only 33 percent of the market.³¹

The different methods used in defining the aluminum market are summarized in formulas below:

Sources of Aluminum Ingot:

- (1) open market virgin ingot;
- (2) Alcoa's own-use virgin ingot;
- (3) secondary or scrap ingot; and
- (4) imported virgin and secondary ingot.

$$\text{Judge Caffey's formula: } \frac{(1)}{(1)} \frac{(3)}{(3)} \frac{(4)}{(4)} = 33 \text{ percent}$$

$$\text{Judge Hand's formula: } \frac{(1)}{(1)} \frac{(2)}{(2)} \frac{(4)}{(4)} = 90 \text{ percent}^{32}$$

The differences hinge upon Alcoa's own-use production (2 above) and secondary-scrap production (3 above). Although the lower court excluded own-use production by Alcoa, Judge Hand maintained that even though this own-use ingot production never reached the open market, it still had an effect on it.³³ In the case of secondary-ingot production, the lower court found that aluminum scrap, or secondary ingot, competed with virgin ingot, and thereby set an upper price limit on the amount Alcoa

²⁶ 221 U.S. at 75-76.

²⁷ *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1896).

²⁸ *Id.* at 340-41.

²⁹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2nd Cir. 1945).

³⁰ *Id.* at 425.

³¹ *Id.* at 424.

³² E. SINGER, *ANTITRUST ECONOMICS: SELECTED LEGAL CASES AND ECONOMIC MODELS* 44 (1968).

³³ 148 F.2d at 424.

could charge for virgin ingot.³⁴ Nevertheless, Judge Hand refused to include secondary ingot in his computation based on the contention that secondary ingot originally was derived from ingot produced by Alcoa some time in the past.³⁵

Judge Hand criticized the Rule of Reason and abuse theory of mergers on the grounds that mere possession of monopoly power, which he defined as simply the power to manage prices, means that this power will be exercised in the setting of prices.³⁶ This decision against Alcoa condemns monopoly without reference to overall market concentration, abuses, predatory acts, injury to competitors, or intent to monopolize. Unfortunately, Judge Hand, upon overthrowing the Rule of Reason and Sherman Tests for monopoly, failed to provide guidelines as to what percentage of control of output of sales constituted monopoly power. That is, once Judge Hand placed all emphasis upon the structural test of the Rule of Reason, then the question becomes one of what percentage control constitutes monopoly power? Judge Hand offers little more than the following statement as to a guide for what percentage of control of a market constitutes monopoly. He states:

That percentage [90 percent of the virgin aluminum ingot market] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.³⁷

Thus, the *Alcoa* case and the *American Tobacco*³⁸ case substituted a new rule of monopoly power for the Sherman Act tests of the Rule of Reason. These decisions established that the monopoly power condemned by the Sherman Act is the power to affect price or exclude competitors. These decisions appear to reject the abuse theory, in which an illegal attempt to monopolize was inferred from the defendant's predatory conduct. It was no longer necessary to establish injury resulting from the misuse of monopoly power; mere possession of monopoly power may constitute a violation of antitrust law. Thus, the general intent of the defendant is de-emphasized and the market power becomes the determining factor.

These new rules and tests, when followed, tend to confuse and mis-direct antitrust policy. For instance, the Alcoa Test of monopolization hinges upon the firm's ability to affect price; yet, in imperfectly competitive markets, all sellers possess this power. As for the ability to

³⁴ 44 F. Supp. 97, 165 (S.D.N.Y. 1941).

³⁵ 148 F. 2d at 424-25.

³⁶ *Id.* at 431-32.

³⁷ *Id.* at 424.

³⁸ *American Tobacco Co. v. United States*, 328 U.S. 781, 808-11 (1946).

exclude competitors, few if any firms possess this power without governmental enforcement to exclude actual or potential competitors. Theoretically, size alone does not bestow upon a firm the power to prevent permanently new entrants in the field. Only if a firm possesses a monopoly grant from government as for instance with a public utility license is it assured of no new entrants in its market.

The *Alcoa* monopolization test and industry structure test relate to the economic questions involved with defining the relevant product-market, geographic market, and the impact upon market structure.

DEFINITION OF THE PRODUCT-MARKET

In the *Cellophane*³⁹ case, the government charged the DuPont Company with monopolizing commerce in cellophane in violation of section 2 of the Sherman Act. DuPont produced about 75 percent of the cellophane sold in the United States, which constituted less than 20 percent of the sales of flexible packaging materials. It was necessary for the government to establish that the relevant market was cellophane, not flexible packaging material, to show monopolizing. If the government failed to convince the court that cellophane was a distinct and separate product market, then the applicable market would include all related flexible packaging materials such as aluminum foil, glassine, Saran, and polyethylene.⁴⁰

The court used two indicators in determining the relevant product market, cross-elasticity of demand and reasonable interchangeability of product.⁴¹ Cross-elasticity of demand measures the percentage change in the quantity demanded of, say, cellophane for a very small percentage change in the price of, say, Saran Wrap, assuming other things remain equal. This measure cannot be relied upon exclusively to define a relevant market unless price is the only important economic determinant for the product. The equation for calculating cross-elasticity of demand measures only price and quantity; all other factors such as quality and consumer tastes are not measured directly.

The legal concept of reasonable interchangeability considers other factors in addition to price, such as quality and type of end-use. Whether the end user regards the product a substitute for another becomes the main focus of this analysis.

After consideration of quality and end-use factors, which were necessarily subjective, Mr. Justice Reed concluded that there was, "... a great sensitivity of customers in the flexible packaging markets to price

³⁹ *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956).

⁴⁰ SINGER, *supra* note 32, at 54.

⁴¹ 351 U.S. at 394, 404.

or quality changes,"⁴² which prevented DuPont from possessing monopoly power over price.⁴³ Cellophane was found to have a high degree of cross-elasticity with other flexible wrapping material.⁴⁴ The court concluded, after examination of price, quality, and end-use of cellophane that a reasonable interchangeability existed between this product and other flexible wrappings; thus, the government lost its case.⁴⁵

It was not long before the court ignored the precedent set in the *Cellophane* case of a broadened product-market definition. In *United States v. Bethlehem Steel Corp.*,⁴⁶ which was an early application of the Celler-Kefauver Act⁴⁷ the court narrowed the definition of the product-market. The Antitrust Division of the Justice Department attempted to enjoin acquisition of Youngstown Sheet and Tube Company by Bethlehem Steel, the sixth and second largest steel producers, respectively. The government alleged that the proposed merger would violate section 7 of the Clayton Act, because it was reasonably probable that direct competition between the two competitors would be substantially lessened.⁴⁸ For a violation of the Celler-Kefauver Act, only a reasonable probability of a substantial lessening of competition or tendency toward monopoly need be shown by the Government.⁴⁹

The court rejected the defendant's argument for a broad product-market definition that would place steel in the general building materials market in competition with non-ferrous metals.⁵⁰ However, buyers of steel since the early fifties obviously have regarded these other materials as close substitutes since other building materials have tended to supplant steel. In addition, the court narrowed the relevant market geographically to include "... the section or sections of the country where the impact of merger may be manifested. . . ."⁵¹

Finally, with *Brown Shoe*,⁵² the relevant product-market was defined so narrowly that an acquisition of G. R. Kinney Company which resulted in the vertical foreclosure of about 2 percent of the retail shoe market was declared monopolistic. In trying the case, the court selected three issues for determination: (1) the lines of commerce, or product-market; (2) the

⁴² *United States v. duPont & Co.*, 118 F. Supp. 41, 207 (1953).

⁴³ 351 U.S. at 400.

⁴⁴ *Id.*

⁴⁵ *Id.* at 404.

⁴⁶ *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958).

⁴⁷ Celler-Kefauver Act, 64 Stat. 1125, 15 U.S.C. §§18, 21 (1950).

⁴⁸ 168 F. Supp. at 595, 618.

⁴⁹ H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

⁵⁰ 168 F. Supp. at 593.

⁵¹ *Id.* at 595, 618.

⁵² *Brown Shoe Co. v. United States*, 370 U.S. 294, 343-46 (1962).

relevant geographical market; and (3) the impact of the merger upon competition.⁵³ These issues have become guides in applying both the Clayton Act (section 7, amended) and the Sherman Act in merger or monopolization cases.

In defining product-market, courts have tended to continually narrow the line of commerce within which competition is allegedly restrained.⁵⁴ The distinguishing feature of a standard commodity, or class of goods, is reasonable interchangeability of units in the class (being guided by the purely competitive model). If the principle of indifference between two products is not operative, the court often considers that there are two separate markets. It is rare, indeed, when buyers are totally indifferent between products. They do have a preference, but given a small increase in the price of their favorite, many will switch to a close substitute.

DEFINITION OF RELEVANT GEOGRAPHIC MARKET AND IMPACT ON MARKET STRUCTURE

The courts and Congress have also narrowed the relevant geographical market. A Senate report has indicated that by "section of the country," it means a self-contained, unitary area in which market forces operate to determine prices.⁵⁵ The report further states that a "section of the country" should be an area "which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country."⁵⁶ But a pricing market is not necessarily limited to a particular geographical area; in fact, it may be national or even international in scope. For instance, although the price of wheat is determined in the Chicago Wheat Exchange, changes in world production or consumption affect the domestic price. This also exists to some extent for oil, steel, copper, and a whole range of products; perhaps this is so for even automobiles with foreign car sales accounting for more than 11 percent of domestic sales.⁵⁷

By continually narrowing the definition of product and geographical market, the final test for the impact of the merger on competition becomes academic. A narrow definition of product-market assures that the concentration ratio in that market area will always be high, indicating monopolization. For example, a relevant product-market defined to be grocery

⁵³ *Id.* at 326.

⁵⁴ See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), product market limited to commercial banks in a four-county area alone; See also *United States v. Aluminum Co. of Am.*, 377 U.S. 271 (1964).

⁵⁵ S. REP. NO. 1775, 81st Cong., 2nd Sess. (1950).

⁵⁶ *Id.* at 5-6.

⁵⁷ R. LIENERT, *Import Car Penetration Drops to 11.08 Percent*, AUTOMOTIVE NEWS, Nov. 8, 1971, at 1 (article mentions imports reached an all-time high in Aug. 1971 of 21.98% of U.S. car sales).

stores within the city limits of a two-grocery-store town will result in a concentration ratio rising to 100 percent if these two stores merged. But, surely this ignores the realities of the situation. First of all, people are quite mobile today; thus, if the merged store began to raise prices or limit services, customers would drive out of town to do their shopping. Secondly, the fact that the single merged store was acting as a monopolist would surely attract other stores seeking to share in the high monopoly profits.

CONGLOMERATE MERGERS AND ECONOMIC CONCENTRATION

Conglomerate merger is defined as any merger that is neither horizontal nor vertical.⁵⁸ The source of market power that allegedly accrues to the conglomerate firm is its supposed ability to shift marketing emphasis and resources among its markets and activities.⁵⁹ In an earlier treatment of conglomerate bigness as a source of power, Corwin Edwards maintained that the conglomerate firm could not be analyzed in terms of traditional theory of the firm, which rested on the assumption that firms maximize profits in each product market. The conglomerate, since it operates across many markets, Edwards stated, "... need not regard a particular market as a separate unit for determining business policy and need not attempt to maximize its profits in the sale of its products. . . ."⁶⁰

More recently, Professor Bower offered the opposite hypothesis, that is, the management of large diversified firms is singularly driven by the profit motive.⁶¹ Since they are not bound by any particular industry loyalty, they react to a broad range of environmental changes. Therefore, these managements are alert to profit opportunities wherever they exist.⁶² Which theory do or should we believe?

Professor Jesse Markham develops a simple mathematical model which directly tests the market power conglomerates are supposed to gain, simply by the nature of being a conglomerate.⁶³ He asks the question, "Does the conglomerate possess a special advantage due to the fact that it is operating in completely separate markets?" Professor Markham concludes:

⁵⁸ A horizontal merger results when two firms join whose products (or services) are in the same general industry, whereas a vertical merger occurs when two firms join where the product of one is a component part or input of another firm or product.

⁵⁹ J. C. NARVER, *CONGLOMERATE MERGERS AND MARKET COMPETITION* 114-15 (1969).

⁶⁰ C. EDWARDS, *Conglomerate Bigness as a Source of Power*, *BUSINESS CONCENTRATION AND PRICE POLICY* 331-32 (1955).

⁶¹ BOWER, *Planning Within the Firm*, *AMERICAN ECONOMIC REVIEW: PAPERS AND PROCEEDINGS*, May (1970).

⁶² *Id.* at 193-94.

⁶³ Markham, *Antitrust and the Conglomerate: A Policy in Search of a Theory*, *CONGLOMERATE MERGERS AND ACQUISITIONS: OPINIONS & ANALYSIS*, 44 ST. JOHNS L. REV. 282 (Special Ed. 1970).

It follows from the foregoing simple mathematical model that a conglomerate producing totally independent products, under conventional profits maximizing assumptions, will set prices and rates of output identical with those that would result if each product were produced by an independent firm.⁶⁴

Markham's results indicate that the conglomerate firm is not in a position to unfairly subsidize one of its product lines from profits earned on other products. Conglomerates alone, therefore, raise no unique public policy issue. It is merely another term for diversification and bestows no special power on the firm.⁶⁵

Following a thorough study of the legislative history and impact of the relationship between firms and conglomerates, John C. Narver arrives at essentially the same conclusion. He states that, "... the fundamental conclusion of this analysis is that conglomerate mergers are not inherently pro-competitive or anti-competitive."⁶⁶ In analyzing the probable competitive effects of conglomerate mergers, Narver finds that it is never sufficient to note the existence of a particular magnitude of conglomerate market power, or that reciprocity has occurred or is possible, or that there has been a loss of potential competition. "In the abstract," Narver points out, "none of these has meaning for determining the effect of the conglomerate merger on competition."⁶⁷

Despite this theoretical evidence, the Department of Justice and the FTC in recent years have moved decisively against conglomerate mergers of all types. A post-war FTC report listing dangers of the conglomerate states:

Perhaps the most important danger . . . inherent in these conglomerate organizations is the economic power which they wield over a large number of different industries. Threatened with competition in any one of its fields of enterprise, the conglomerate corporation may sell below cost or may use other unfair methods in that field, absorbing its losses through excessive profits made in its other lines of activity.⁶⁸

The intense concern expressed by FTC with conglomerate mergers and in mergers in general apparently stems from the belief that increased concentration is taking place in American industries.

⁶⁴ *Id.* at 285.

⁶⁵ *Id.* at 290.

⁶⁶ NARVER, *supra* note 59, at 137.

⁶⁷ *Id.*

⁶⁸ S. Doc. No. 17, 80th Cong., 1st Sess. (1947).

THE FEAR OF ECONOMIC CONCENTRATION AS A GUIDE TO ANTITRUST POLICY

Fear of increased concentration was expressed recently in the report of the antitrust task force headed by Dean Phil C. Neal, which recommended new legislation supplementing present antitrust statutes.⁶⁹ The purpose of the new statute "would be to give enforcement authorities a clear mandate to use established techniques of divestiture to reduce concentration."⁷⁰

Statistical studies of overall industry concentration are rare. Most studies of market concentration deal mainly with concentration in manufacturing which accounts for less than two-fifths of the income produced by unregulated private non-financial enterprises. These studies tell little of the market structure of other sectors which make up the bulk of our economy which includes the service industries now becoming so important. A recent analysis of the trend of concentration over the past 60 years was conducted by Morris A. Adelman. Piecing together an earlier study by G. Warren Nutter of the trend of concentration between 1899 and 1939 with more recent data for 1947, 1954, and 1958, Professor Adelman concludes that, over the period covered:

... [t]he odds are better than ever that there has actually been some decline in concentration. It is a good bet that there has at least been no actual increase; and the odds seem high against any substantial increase.⁷¹

Professor Adelman's data combined with the earlier Nutter results appear in Appendix A (Columns 1-5). In addition, an attempt is made to introduce results of the Census of Business for 1963 and 1966 in Columns 6 and 7 of Appendix A. These results tend to support the earlier evidence of little or no increase in average concentration ratios. In fact, there appears to have been a discernible decline in the total average concentration ratios since the peak in 1958. Due to possible statistical error, however, all that can be said for certain is that concentration, even in the most concentrated area of manufacturing, has not increased.

ANTITRUST APPROACHES IN ATTACKING CONGLOMERATE MERGERS

Evolution of antitrust actions in regard to conglomerate mergers has taken the form of complaints and court judgments concerning

⁶⁹ *Task Force Report on Antitrust Policy*, TRADE REGULATION REPORTS (Supp. 1, 1969).

⁷⁰ *Id.* at 415.

⁷¹ *Hearings on S. Resolution 262 Before the Subcommittee on Antitrust and Monopoly, On Economic Concentration, Overall and Conglomerate Aspects*. 88th Cong., 2nd Sess. Part I 287 (1964).

alleged violations in three specific areas: (1) wealth, (2) potential competition, and (3) reciprocity.⁷²

The issue in wealth complaints is that as a result of the merger there is an improved ability of a corporation to deal with the rigors of the market through a subsidy that the acquired firm could obtain from the acquiring firm.⁷³ This might take place in either of two different ways; first through purely financial assistance as would apply to a divergent conglomerate merger where each firm is engaged in separate markets and products. Second, through production or marketing advantages in convergent conglomerate mergers where the two firms, when merged, could take advantage of the economics of scale of sub-operations by combining them, as in advertising, use of by-products, or other similarities.

The facts considered in wealth cases usually are: (1) the size of the acquiring company in relation to the size of the largest manufacturer in the acquired company's industry; (2) the position of the acquired company in its industry and the degree of concentration in that industry; (3) the elimination of competition in that industry; (4) the position of the acquiring company in its other market; (5) the nature of the economies enabled by the merger.⁷⁴

The theory of the complaints in cases involving potential competition is displayed in *United States v. Penn Olin Chemical Co.*⁷⁵ In this case, the two firms were competitors in the relevant market, and a merger of the two would be a violation of the Clayton Act, section 7. In addition, mergers have been attacked if two firms prior to such merger sold their products in separate markets and there existed a possibility that one firm might have entered the acquired firm's market through internal expansion thus becoming a competitor of the acquired firm.⁷⁶ Another example is where the acquired firm might have become a competitor of the acquiring firm, or where either one might have become a competitor of the other in a market new to both;⁷⁷ there is a lessening of competition through the elimination of this so-called potential competition.

The potential competition doctrine is still not a concrete one and has not been applied evenly across the board. Potential competition, as defined, can take another form, that of a market extension merger. This

⁷² See cases discussed in text *infra*.

⁷³ Relevant wealth cases are: *FTC v. Proctor & Gamble Co.*, 386 U.S. 1224 (1967); *Scott Paper Co. v. FTC*, 1962 CCH TRADE CASES ¶70, 271 (1962).

⁷⁴ *NARVER*, *supra* note 59, at 79-88.

⁷⁵ 246 F. Supp. 917 (D. Del. 1965).

⁷⁶ *Proctor & Gamble Co.* [1963-1965 Transfer Binder] TRADE REG. REP. ¶16, 673, at 21, 558 (FTC 1963).

⁷⁷ *United States v. Penn-Olin Chemical Co.* [1963-1965 Transfer Binder], TRADE REG. REP. ¶70, 762, at 78, 064 (FTC 1963).

type would occur when a firm acquires another firm which produces the same or similar product, but in different markets. This would be a geographic extension merger similar to a horizontal merger but in a different market. In this case, there is supposed to exist the possibility that the two companies might become competitors in the future in the same market. The most relevant judicial opinion in the potential competition area is contained in the *Foremost Dairy* case,⁷⁸ which was decided in the early fifties, and involved geographic diversification.

The FTC held in the *Foremost Dairy* case that when a large firm acquires a small independent firm, the other small firms are hurt because the remaining firms' success depends upon their success in a limited market while the acquired firm is backed by the large conglomerate.⁷⁹ The FTC said, "the resultant disparity in size and type of operation permits the large conglomerate to strike down its smaller rivals with relatively little effort or loss in overall profit."⁸⁰

In the potential competition field, there exists another contention that the merger will increase barriers to entry into a market causing a decrease in the possibility of future potential competitors to develop. This theory was a factor in *FTC v. Proctor & Gamble Co.*,⁸¹ where it was feared that barriers to new entrants to the bleach market would have developed had the merger been allowed.

Reciprocity is the third violation alleged by the antitrust agencies, wherein a conglomerate may exert certain pressures upon suppliers who are also potential customers of the conglomerate and such may tend to lessen competition substantially. Reciprocity occurs when the acquiring corporation agrees to deal with the acquired corporation. Reciprocity only becomes important in acquisitions when the acquiring corporation has sufficient market power or leverage to enforce reciprocity. The alleged competitive evil of reciprocity is that it will foreclose competition in the acquired corporation's market by foreclosing certain markets to its competitors.

The first decision involving reciprocity was *FTC v. Consolidated Foods Corp.*⁸² The Supreme Court determined that as a result of the merger, there was a probability of reciprocity. The product lent itself to reciprocity and Consolidated encouraged such practices. Reciprocity was also at issue in *United States v. General Dynamics and Liquid Carbonic Corp.*⁸³

⁷⁸ *Foremost Dairies Inc.*, 60 FTC 944 (1962).

⁷⁹ *Id.* at 1083-84.

⁸⁰ *Id.* at 1084.

⁸¹ 386 U.S. 1224 (1967).

⁸² 380 U.S. 592 (1965).

⁸³ 246 F. Supp. 156 (S.D.N.Y. 1965).

Instead of attempting to treat conglomerate mergers, separately and distinctly, as if conglomerateness or diversification imparts additional market power, perhaps the Government should concentrate on the traditional Clayton, section 7, approach. That is, the Government should examine the evidence in the proposed merger for an indication of a reasonable probability of substantial lessening of competition or tendency toward monopoly.

SOME MODEST RECOMMENDATIONS FOR ANTITRUST POLICY

As is often the case, criticisms for a particular governmental policy are vehement and plentiful; however, when it comes to suggestions for improvements, silence greets the inquirer. The recommendations that follow are based upon several simple guidelines. First, all rules for public conduct—which is what the antitrust laws are—should meet the following criteria as best as possible: clarity of statement; equality in application; and impartiality in enforcement. Unfortunately, the present structure of antitrust laws and policy seem to “violate” practically every criterion listed above.

The first suggestion is that at a minimum, most, if not all, laws exempting industries and activities from direct application of antitrust laws should be repealed.⁸⁴ Specific exemptions from the antitrust laws have been provided for a long list of industries and activities including all public transportation, communication, most agricultural marketing, and to some extent insurance companies.

The exemption to labor unions perhaps should be handled differently, since they were specifically granted monopoly bargaining by federal law in the first place (The Wagner Act).⁸⁵ It seems illogical to attack labor unions for utilizing their monopoly position to extract economic gains for their membership. If it is felt that unions generally are abusing their monopoly position, this would suggest revisions in the original laws granting them this special power. Labor unions still are subject to antitrust if they combine or conspire with an employer group to injure trade or fix product prices.⁸⁶

Appendix B lists the major exemptions to antitrust and the laws that grant these specific exceptions. It will be noted that these can be grouped according to special circumstances. Group A are all related in one way or another to the Great Depression. Farmers entered the Depression more than a decade before the rest of the economy, which explains their

⁸⁴ Appendix B, *infra* lists the major exemptions from antitrust and the laws that grant these exemptions.

⁸⁵ National Labor Relations Act (Wagner Act), 49 Stat. 449, 29 U.S.C. §159 (1935).

⁸⁶ 15 U.S.C. §13 (1914), *as amended*, 15 U.S.C. § (1936).

exemptions dating from 1914 and 1922. The conditions under which most, if not all, of these exemptions to antitrust were granted have long since ceased to exist. Group B are all associated with war-related conditions or alleged special circumstances requiring regulatory prerogatives.

Generally, during wartime conditions defense industries are granted exemptions from antitrust. The danger lies in the fact that collusive agreements forged during wartime may carry over into peacetime. Also, tremendous government purchases and outright aid to defense industries encourage the growth of a giant military-industrial complex with vested interests in its own survival.

THE REGULATED INDUSTRIES—LEGALIZED CARTELS

The President's Council of Economic Advisors, the head of the Justice Department's Antitrust Division, and the Advisory Council on Executive Reorganization are unanimous in their criticism of the present methods of regulating surface transportation.⁸⁷ Under the laws establishing various regulatory commissions for public transportation, exemptions from antitrust were granted. The essence of the Reed-Bulwinkle Act, amending the Interstate Commerce Act,⁸⁸ is that agreements on rates made by railroads, or inland waterway carriers subject to the Interstate Commerce Commission⁸⁹ are relieved from operation of antitrust laws whenever their practices are approved by the ICC.⁹⁰

The Transportation Act⁹¹ converted the ICC into an operator of a national transportation cartel. Under ICC regulations, different rates are approved for commodities despite there being no difference in the service offered or the costs of transportation. Moreover, the ICC limits the number of firms allowed to engage in particular modes of common carrier transportation.⁹² It actually maintains a price umbrella for truckers, barge lines, coastal steamship operators and railroads.⁹³ For the other transport regulators, the Civil Aeronautics Board sets minimum air cargo rates and passenger flight rates. It even attempts to regulate the types of services provided at rates to prevent one airline from offering a better service than another.⁹⁴ The Federal Maritime Board forces United States steamship

⁸⁷ See *Council of Economic Advisers Joins Ranks of those Assailing Transport Regulation*, *The Wall Street Journal*, Feb. 2, 1971, at 2, col. 3.

⁸⁸ Interstate Commerce Act, 24 Stat. 379 (1887).

⁸⁹ Hereinafter cited as ICC.

⁹⁰ V. A. MUND & R. H. WOLD, *INDUSTRIAL ORGANIZATION AND PUBLIC POLICY* 326 (1971).

⁹¹ Transportation Act (Each-Cummins Act), 41 Stat. 456, 49 U.S.C. §15-a (1887).

⁹² *Id.* at §20-a.

⁹³ Hilton, *Barriers to Competitive Rate Making*, 29 ICC PRAC. J. 1083 (1962).

⁹⁴ Civil Aeronautics Act, Appendix B note 7 *infra*.

lines into Oceanic Conferences, which are privately operated international cartels that set ocean freight rates and attempt to prevent rate cutting.⁹⁵

In the Economic Report of the President, the Council of Economic Advisors maintains that regulation results in high freight rates, yet causes financial losses for some carriers.⁹⁶ Furthermore, the Council states that regulation leads to inefficient use of the nation's resources, such as locating businesses and factories near congested urban areas to avoid the high costs of shipping finished products.⁹⁷ The Council recommends gradual deregulation for transport industries.⁹⁸ At first, carriers could be given freedom to set rates within a narrow band above and below present set rates, with the band later widened. Market entry could be progressively freed, allowing for greater inter-competition between carriers themselves. Next, restrictions against carriers leaving unprofitable markets could gradually be removed. And, most important, transportation companies would become subject to antitrust laws.

The Chief of the Antitrust Division, Richard W. McLaren, recommended that:

... [A]fter a suitable period in which regulations are phased out, surface transportation should operate like any other business. Competition should be allowed to determine the price, quality and availability of transportation services.⁹⁹

In addition, the antitrust chief recommended Congress repeal antitrust exemptions enjoyed by regulated transport companies in rate-fixing and certain other areas.

ICC regulation of public carriers was born with regulation of the railroads over 84 years ago when railroads possessed a virtual monopoly on overland public transportation.¹⁰⁰ As new modes of transportation came on the scene, Congress, instead of deregulating railroads, chose to extend regulations to each new mode. Whatever economic justification originally existed for transport industry regulation has tended to disappear with the proliferation of competing means of transportation available today.

The Advisory Council on Executive Organization advocates combining the ICC, Civil Aeronautics Board, and Federal Maritime Commission into a unified Transportation Regulatory Agency with a single administrator.¹⁰¹

⁹⁵ 54 Stat. 898 (1940).

⁹⁶ Council of Economic Advisers, *Economic Report of the President*, 123-24 (1971).

⁹⁷ *Id.* at 127.

⁹⁸ *Id.* at 126.

⁹⁹ *Antitrust Chief Lashes ICC, Urges an End of Regulation Over Mass Transportation*, *The Wall Street Journal*, Jan. 29, 1971, at 5, col. 2.

¹⁰⁰ Transportation Act (Each-Cummins Act), 41 Stat. 456, 49 U.S.C. §15-a (1887).

¹⁰¹ *Id.*

REPEAL OF SPECIAL INTEREST REGULATION

In addition to removing antitrust exemptions from numerous activities and industries, several pieces of special interest legislation are candidates for repeal. Antitrust laws have always been vigorously applied to strike down price fixing among distributors and manufacturers. Resale price maintenance laws make it possible for a manufacturer or distributor of products bearing a trademark, brand, or producer's name, to fix by contract the minimum or actual wholesale and retail price. These contracts would be held illegal per se under section 1 of the Sherman Act and section 5 of the FTC Act in the absence of the Miller-Tydings and McGuire Acts (Appendix B, Item 5).

The original Miller-Tydings Act¹⁰² was another piece of Great Depression special interest legislation which was supposedly passed to benefit the small retailer and wholesaler interested in restricting price competition at the retail level.¹⁰³ However, it has been used most successfully by large manufacturers of brand-name products that are highly advertised, non-perishable, and widely distributed. Much of the important litigation has involved large liquor distillers.¹⁰⁴

Manufacturers of brand-name products have been interested in resale price maintenance to maintain price identity and generous margins for wholesalers in order to hopefully assure wide distribution for their products. It also serves as a means of preventing price chiseling at the retail level.¹⁰⁵

Suits to eliminate the "non-signers" clause, which obligates all retailers or wholesalers in a state once a single price maintenance contract is signed, resulted in a powerful lobby which gained passage of the federal McGuire Act.¹⁰⁶ Since 1953, a growing number of state fair trade statutes have been weakened or invalidated by their respective state courts, which leaves only 21 states with fully operative price-maintenance laws.¹⁰⁷ The Michigan Supreme Court, for instance, stated that the process of reducing prices by competition does not bring evils to the general welfare.¹⁰⁸

Both the Miller-Tydings and the McGuire Acts should be repealed by Congress as blatant attempts to secure the privilege to fix prices at the wholesale and retail levels by certain branded products.

¹⁰² Miller-Tydings Act (Fair Trade Act) 50 Stat. 693, 15 U.S.C. §1 (1937).

¹⁰³ REPORT OF THE FEDERAL TRADE COMMISSION ON RESELL PRICE MAINTENANCE, LXI (1945).

¹⁰⁴ Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951).

¹⁰⁵ F. JONES, RETAIL MERCHANDISING 391 (1957).

¹⁰⁶ 341 U.S. 384.

¹⁰⁷ V. A. MUND and K. H. WOLF, *supra* note 90, at 196.

¹⁰⁸ *Id.* at 197.

Another special interest law passed during the Great Depression is the Robinson-Patman Act, which amends section 2 of the Clayton Act relating to price discrimination. The Robinson-Patman Act, often referred to as the anti-chainstore law, completely revised the original price discrimination section of the Clayton Act. The idea was to protect the independent wholesaler and retailer faced with increasing competition from chain stores and other mass distributors.

The chain store and grocery chain are nothing more than marketing innovations to provide greater efficiency, variety and convenience in distributing a whole range of products to the ultimate consumer. Its demonstrated superiority is attested to by the fact that the concept has spread throughout the western world.

The Robinson-Patman Act: (1) prohibits price discriminations which have the effect of substantially lessening competition or tending to create a monopoly in any line of commerce or the effect of injuring, destroying, or preventing competition either with persons who grant or knowingly receive the benefits of such discrimination;¹⁰⁹ but the law (2) allows price discriminations to be made "in good faith to meet the equally low price of a competitor";¹¹⁰ (3) prohibits brokerage payments to buyers outright;¹¹¹ (4) prohibits advertising or sales allowances not made "on proportionately equal terms" to all purchasers;¹¹² and, (5) prohibits buyers from knowingly receiving or inducing such price discriminations.¹¹³ The language of the act leaves a broad area of interpretation by the courts.

Briefly, the law condemns both primary-line (same line of commerce as accused seller) and secondary-line (line of commerce in which seller's customers are engaged) discrimination. All that the party alleging damages needs to demonstrate is (1) that he was discriminated against in terms of price and (2) he suffered injury; that is, he lost some business as a result of alleged price discrimination.

Under the Robinson-Patman amendment to the Clayton Act (section 2), the burden of proof is shifted to the defendant by the alleged act of price discrimination being made *prima facie* illegal. One economist, upon closely examining the record of unfair competition and price discrimination, observed that most alleged instances:

... [H]ave usually turned out to be the efforts of a seller to popularize a new product, to cut cost by lining up orders in advance

¹⁰⁹ Robinson-Patman Act, 15 U.S.C. §2(a) (1914), *as amended*, 15 U.S.C. §2(a) (1936).

¹¹⁰ *Id.* at §2b.

¹¹¹ *Id.* at §2c.

¹¹² *Id.* at §2d.

¹¹³ Robinson-Patman Act, 15 U.S.C. §§13, 13(a), 13(b), 21(a) (1936), *as amended*, 15 U.S.C. §13(c) (1938).

of production, or to maintain different prices in different markets in order to increase profit.¹¹⁴

By attempting to legislate against price discrimination, there is always the risk of condemning normal and necessary price competition. Some economists feel that many trade practices condemned as predatory or exclusionary are really indispensable features of the process of competition itself.¹¹⁵

In light of the confused nature of the law, the lack of positive results from antitrust enforcement, and the danger of attacking legitimate price competition, the Robinson-Patman Act should be repealed by Congress. The original reasons for its passage have long since failed to be relevant. Today, independent stores compete aggressively alongside not only chain stores, but also discount houses. Each offers a slightly different service to customers—the small independent store offers convenience, personal attention and often, additional store hours.

CONCLUSION—NEED FOR CLARITY, EQUALITY, AND IMPARTIALITY IN ANTITRUST POLICY

Antitrust policy has been found to provide less than a crystal-clear guide to business practices. The basic difficulty is the failure of Congress, antitrust enforcers, and the courts to steadfastly adhere to the goal of protection of consumer welfare. The legislative intent behind the Sherman Act, as well as the recognized purpose of antitrust policy in general is: (1) prevention of restraint of trade and the exercise of monopoly power; (2) maintenance of full and open competition; and, (3) attack of all practices that result in higher costs to the consumer of articles of commerce.¹¹⁶

Development of the dichotomy of goals—attempts to protect competitors as well as consumers—has contributed to an apparent loss of emphasis and confusion in antitrust policy. The proliferation of exemptions to antitrust laws has tended to blunt their effectiveness, and spread confusion and disrespect for the laws.

Two economic errors of antitrust policy are discussed in this article. The first is the misinterpretation of unfair competition by the Federal Trade Commission. Instead of adhering to the concept of protecting consumer welfare, the FTC has forbidden certain business practices long before they injured consumers, or even competitors. The effect of this policy of attacking competitive practices of aggressive growth firms under the pretense that their activities may result in monopolization

¹¹⁴ Dewey, *supra* note 1, at 19.

¹¹⁵ *Id.*

¹¹⁶ Text *supra* at 70.

or potential harm to competitors may result in making the position of the largest sellers safer from competition.

Another economic error in antitrust policy is the trend toward attacking practically any merger in what is defined as an oligopoly industry (product-market where any four or fewer firms' market share exceeds 70 percent).¹¹⁷ Courts have contributed to the error by continually narrowing the definition of the product-market and relevant section of the country, which tends to raise any measure of concentration to indicate higher levels of concentration than would otherwise have been the case.

This indiscriminate attack on all mergers in oligopoly industries is apparently based upon the belief that overall concentration is increasing over time. Unfortunately, empirical evidence fails to support this contention—evidence of the trends in overall concentration is inconclusive but it does not show a significant increase. Antitrust opposition to conglomerate mergers as if they were an evil is illogical and without theoretical or empirical support. Since no study has yet demonstrated that mergers generally or conglomerate mergers specifically, are wrong or anti-competitive in themselves, it seems ill-advised for antitrust to attack every merger above a certain size or involving an oligopoly industry simply because some arbitrarily defined concentration ratio rises.

All too often Americans believe solutions to problems can be found only by passing a new law. But, causes of the present antitrust jungle appear to be too many conflicting laws whose interpretation by antitrust officials and the courts has tended to contribute to the overall confusion. Suggested changes in emphasis and repeals recommended here are not intended to weaken but instead to strengthen antitrust policy. The antitrust laws cannot be guides to good business behavior if the rules are ambiguous and are applied capriciously to some, while entire industries or activities are exempt from the laws.

¹¹⁷ TRADE REGULATION REPORTS, *supra* note 69.

Appendix A

Average Concentration Ratios*

	1	2	3	4	5	6	7
	PERCENT OF VALUE ADDED IN INDUSTRIES WITH CONCENTRATION OVER 50						
INDUSTRY GROUP	1901	1947	AVERAGE CONCENTRATION†				
	1901	1947	1947	1954	1958	1963†	1966†
Food and kindred products	39.1	18.8	34.9	33.8	32.6	33.7	34.8
Tobacco manufacturers	49.9	77.7	76.2	73.4	74.1	74.6	75.0
Textile mill products	20.3	9.0	24.3	26.5	29.2	32.7	33.9
Apparel and related products		2.2	12.6	13.0	13.4	16.5	18.1
Lumber and wood products5	11.2	10.8	12.8	14.9	15.8
Furniture and fixtures		8.1	21.9	20.3	19.0	16.9	18.0
Pulp, paper and products	71.0	1.6	21.2	24.8	25.9	30.2	29.7
Printing and publishing	1.0	0.0	19.7	17.7	17.6	18.6	17.4
Chemicals and related products	24.3	33.7	51.0	48.6	45.7	43.9	42.7
Petroleum and coal products	46.8	13.6	39.5	36.6	31.6	33.9	32.0
Rubber products	100.0	59.9	58.6	54.1	51.3	34.9	33.1
Leather and leather products	26.3	0.0	26.2	26.4	25.0	23.3	24.3
Stone, clay and glass products	13.3	43.9	43.4	46.4	40.3	37.2	38.3
Primary metal products	45.7	21.0	43.8	49.5	46.8	41.5	40.2
Fabricated metal products		8.4	25.3	26.1	25.5	24.3	23.3
Machinery, except electrical	41.4	18.5	38.0	33.2	35.5	33.9	33.0
Electrical machinery		53.2	54.1	48.2	46.9	44.7	46.4
Transportation equipment	57.3	84.2	54.4	58.7	61.3	62.0	61.5
Instruments and related products		45.0	45.3	47.4	47.8	46.3	49.6
Miscellaneous manufacturers	2.7	21.2	34.9	16.1	22.6	27.6	27.6
TOTAL, ALL INDUSTRIES	32.9	24.0	35.3	36.9	37.0	35.8	34.0

Source: Morris A. Adelman, *Changes in Industrial Concentration*, MONOPOLY POWER AND ECONOMIC PERFORMANCE, 79 (Edwin Mansfield ed. 1968).

* Note:

For each 4-digit industry (i.e., canned fruits and vegetables) included in a 2-digit major industry group (i.e., Food and Kindred Products), a concentration ratio was computed showing the percent of sales accounted for by the four largest firms in the industry. The weighing factor of each 4-digit industry was its value added (difference between purchases and sales), which measures its own contribution to national product. Each 4-digit industry's concentration ratio was multiplied by its weighing factor (shown in Columns 3-7), and all results total.

‡ Data for 1947, 1954, and 1958. Adelman, *supra*.

† Data for 1963 and 1966 compiled by author from: U.S. Bureau of the Census, *Annual Survey of Manufacturers: 1966, Concentration Ratios*, 415-441 (1968).

Appendix B

Exemptions of Particular Industries and Activities from Antitrust Laws

Industry or Activity (Date)	Law or Laws Providing Exemption
Labor Unions (1914) and Later judicial decisions	Clayton Act, Section 6
GROUP A—GREAT DEPRESSION:	
1. Agricultural Product Handlers (1937)	1. Agr. Mkt. Agreement Act ¹
2. Agricultural Cooperatives (1914 and 1922)	2. Capper-Volstead Act ²
3. Aquatic Product Associations (1934)	3. Fishermen's Cooperative Mkt. Act ³
4. Mfrs. and Handlers— Hog Cholera Serum (1935)	4. Agr. Adjustment Act., Sec. 57 ⁴
5. Resale Price Maintenance (1937)	5. Miller-Tydings Act ⁵ and McGuire Act (1952) ⁶
6. Air Carriers (1938)	6. Civil Aeronautics Act ⁷
GROUP B—WAR AND/OR REGULATORY:	
7. Water carriers in foreign and domestic commerce (1916)	7. Shipping Act (amended) ⁸
8. Business Assns. in export trade (1918)	8. Webb-Pomerene Act ⁹
9. Telegraph Companies (1943)	9. Fed. Communications Act ¹⁰
10. Railroads and other surface carriers (1948)	10. Reed-Bulwinkle Act ¹¹
11. Defense Industries in time of war (1950)	11. Defense Production Act (1950) ¹² and Small Bus. Mobilization Act (1942) ¹³
12. Insurance Companies (1945)	12. McCarran Act ¹⁴

¹ Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. §608(b) (1937).

² Agricultural Producers' Associations Act (Capper-Volstead Act), 42 Stat. 388, 7 U.S.C. §§291, 292 (1922).

³ Fishermen's Collective Marketing Act, 48 Stat. 1213, 15 U.S.C. §§521, 522 (1934).

⁴ Agricultural Adjustment Act, 48 Stat. 31, 7 U.S.C. §§601-605, 607-623 (1933).

⁵ Fair Trade Act (Miller-Tyding's Act), 50 Stat. 693, 15 U.S.C. §1 (1937).

⁶ Fair Trade Act (McGuire Act), 66 Stat. 632, 15 U.S.C. §45 (1952).

⁷ Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. §§1301-1542 (1938).

⁸ Shipping Act of 1916, 39 Stat. 728, 46 U.S.C. §§801-842 (1916), *as amended*, 62 Stat. 212, 46 U.S.C. §838 (1948).

⁹ Export Trade Act (Webb-Pomerene Act), 40 Stat. 517, 15 U.S.C. §§61-65 (1918).

¹⁰ Communications Act of 1943, 57 Stat. 5, 47 U.S.C. §§214, 222 (1943).

¹¹ Carriers' Rate Bureau Act (Reed-Bulwinkle Act), 62 Stat. 472, 49 U.S.C. §5 (1948).

¹² Defense Production Act of 1950, 50 U.S.C. §2158 (1950).

¹³ Small Business Mobilization Law, 56 Stat. 351 (1942).

¹⁴ McCarran-Ferguson Insurance Regulation Act, 50 Stat. 33, 15 U.S.C. §§1011 *et seq.*